

OLL 84-1830

7 May 1984

MEMORANDUM FOR: See Distribution

FROM: [] Deputy Chief
Legislation Division
Office of Legislative Liaison

SUBJECT: FOIA Testimony for Executive Director for
Presentation Before House Government Operations
Subcommittee on Government Information,
Justice, and Agriculture on 10 May 1984

1. Attached for your information is a brief statement which has been prepared for the Executive Director to give this Thursday concerning our FOIA legislation, H.R. 5164. The Executive Director has read and approved the statement and it is now at the Office of Management and Budget for clearance. Subcommittee staff have requested that multiple copies of the statement be made available to them by tomorrow, 8 May.

2. The statement is a summary of our previous testimony describing the problems we encounter under the FOIA. As you can see from the statement, [] will be submitting for the record a verbatim excerpt from Deputy Director McMahon's testimony before HPSCI in February wherein the DDCI described our FOIA problems in detail.

3. The Executive Director will be the first witness to appear before the Subcommittee. As indicated in the statement, he will be accompanied by [] DD/OLL and [] C/IPD/OIS. Details concerning the hearing were sent to you in my 3 May memorandum. Please let us know as soon as possible if you would like to attend the hearing.

Attachment
As stated



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STATEMENT OF



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EXECUTIVE DIRECTOR
CENTRAL INTELLIGENCE AGENCY
BEFORE THE
GOVERNMENT OPERATIONS SUBCOMMITTEE
ON GOVERNMENT INFORMATION, JUSTICE & AGRICULTURE

10 MAY 1984

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE, IT IS A PLEASURE TO APPEAR BEFORE YOU THIS MORNING TO DISCUSS H.R. 5164, THE "CENTRAL INTELLIGENCE AGENCY INFORMATION ACT". WE LAST APPEARED BEFORE YOU TO DISCUSS OUR CONCERNS WITH THE FREEDOM OF INFORMATION ACT (FOIA) IN FEBRUARY 1980. SINCE THAT TIME, THE CENTRAL INTELLIGENCE AGENCY (CIA) HAS PERSISTED IN ITS EFFORTS TO ACHIEVE NEEDED RELIEF FROM THE UNIQUE PROBLEMS POSED TO IT BY THE FOIA. WE BELIEVE THAT H.R. 5164 WILL PROVIDE THE CIA WITH SUBSTANTIAL RELIEF FROM THESE PROBLEMS WITHOUT REDUCING THE AMOUNT OF MEANINGFUL INFORMATION WHICH CAN BE RELEASED TO THE PUBLIC.

AS YOU KNOW, MR. CHAIRMAN, DEPUTY DIRECTOR McMAHON HAS PRESENTED OUR PROBLEMS WITH THE FOIA IN GREAT DETAIL TO BOTH THE SENATE AND HOUSE INTELLIGENCE OVERSIGHT COMMITTEES DURING THE COURSE OF THE 98TH CONGRESS. WITH YOUR PERMISSION, MR. CHAIRMAN, I WOULD LIKE TO SUBMIT FOR THE RECORD DEPUTY DIRECTOR McMAHON'S EXPLANATION OF THESE PROBLEMS AS CONTAINED IN THE STATEMENT HE GAVE BEFORE THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE LAST FEBRUARY. I WILL THEN SUMMARIZE THESE PROBLEMS AND BRIEFLY DISCUSS H.R. 5164.

AS AN INTELLIGENCE AGENCY, OUR RECORDS SYSTEMS MUST BE RESPONSIVE TO BOTH THE FUNCTIONS OF THE CIA AS WELL AS TO THE SECURITY NEEDS OF THE AGENCY. THEREFORE, RATHER THAN HAVING ONE OVERALL FILING SYSTEM WITH ONE CENTRAL INDEX, THE CIA HAS

NUMEROUS SELF-CONTAINED FILE SYSTEMS. COMPARTMENTATION FULFILLS A VITAL SECURITY NEED AND ALSO ALLOWS EACH FILE SYSTEM TO REFLECT THE NEEDS OF AN INDIVIDUAL AGENCY COMPONENT. OUR OPERATIONAL FILES ARE EVEN MORE STRINGENTLY COMPARTMENTED BECAUSE THEY DIRECTLY REVEAL INTELLIGENCE SOURCES AND METHODS. ANOTHER RELEVANT SECURITY PRINCIPLE WE OPERATE UNDER IS THAT AGENCY PERSONNEL HAVE ACCESS TO SPECIFIC FILES ONLY ON A "NEED TO KNOW" BASIS. WHEN AN FOIA REQUEST IS RECEIVED BY THE CIA THESE PRINCIPLES OF COMPARTMENTATION AND LIMITED ACCESS ARE BROKEN DOWN. AN FOIA REQUEST ON A GENERALLY DESCRIBED SUBJECT MATTER MUST BE DISTRIBUTED TO SEVERAL DIFFERENT AGENCY COMPONENTS SO THAT A SEARCH CAN BE MADE OF ANY FILE SYSTEM WHICH MIGHT CONTAIN RESPONSIVE RECORDS. IN MANY INSTANCES THE RESULTS OF THESE SEARCHES ARE PRODIGIOUS. THOUSANDS OF PAGES OF RECORDS ARE AMASSED FOR REVIEW EACH YEAR. THUS, RECORDS OTHERWISE RESIDING IN COMPARTMENTED FILE SYSTEMS ARE PULLED TOGETHER AND NUMBERS OF AGENCY PERSONNEL ARE GIVEN ACCESS TO INFORMATION WHICH THEY OTHERWISE HAVE NO NEED TO KNOW.

ONCE RESPONSIVE RECORDS ARE LOCATED, THEY MUST BE CAREFULLY REVIEWED LINE BY LINE, WORD BY WORD, BY HIGHLY SKILLED OPERATIONAL PERSONNEL WHO HAVE THE NECESSARY TRAINING AND EXPERIENCE TO IDENTIFY SOURCE-REVEALING AND OTHER SENSITIVE INFORMATION WHICH COULD BE USED BY OUR ADVERSARIES. THE REVIEWING OFFICER IS FULLY AWARE OF THE REQUIREMENT OF THE FOIA THAT EACH "REASONABLY SEGREGABLE" ITEM OF UNPROTECTED

INFORMATION MUST BE RELEASED AND THAT HE OR SHE MUST BE PREPARED TO DEFEND EACH DETERMINATION TO WITHHOLD AN ITEM OF INFORMATION BECAUSE IT IS CLASSIFIED OR OTHERWISE EXEMPTED FROM RELEASE UNDER THE FOIA.

THIS REVIEW PROCESS IS PARTICULARLY BURDENSOME WHEN IT INVOLVES OUR OPERATIONAL RECORDS. AN FOIA REQUESTER WHO MAKES A REQUEST FOR INFORMATION TO THE CIA WHICH INVOLVES RECORDS IN OUR DIRECTORATE OF OPERATIONS CAN NOW ANTICIPATE WAITING TWO TO THREE YEARS TO RECEIVE A RESPONSE. THE BACKLOG WHICH STEMS FROM THE TIME-CONSUMING PROCESS OF REVIEWING OPERATIONAL RECORDS CANNOT BE SOLVED FOR THE CIA BY SIMPLY HIRING MORE REVIEWERS. THESE INDIVIDUALS ARE NOT AND CANNOT BE SIMPLY CLERICAL STAFF OR EVEN "FOIA PROFESSIONALS". IN ORDER TO DO THEIR JOB, THEY MUST BE CAPABLE OF MAKING DIFFICULT AND VITALLY IMPORTANT OPERATIONAL JUDGMENTS, AND, CONSEQUENTLY, MOST OF THEM MUST COME FROM THE HEART OF THE AGENCY'S INTELLIGENCE CADRE. MOREOVER, BEFORE ANY ITEM OF INFORMATION IS RELEASED UNDER THE FOIA, THE RELEASE MUST BE CHECKED WITH A DESK OFFICER WITH CURRENT KNOWLEDGE OF THE OPERATIONAL ACTIVITY INVOLVED. HENCE, WE MUST NOT ONLY CALL INTELLIGENCE OFFICERS ON A FULL-TIME BASIS AWAY FROM THEIR PRIMARY DUTIES, BUT WE MUST ALSO CONTINUALLY DIVERT THE ATTENTION OF THE OFFICERS OF OUR OPERATING COMPONENTS. I AM SURE THAT YOU CAN UNDERSTAND THE NECESSITY FOR THIS PRACTICE SINCE THE RISK OF COMPROMISE IS SO GREAT. UNFORTUNATELY, EVEN WITH THIS PRACTICE WE KNOW THAT

MISTAKES CAN BE MADE AND, THEREFORE, THE ELEMENT OF HUMAN ERROR IN THE REVIEW AND RELEASE OF OPERATIONAL RECORDS IS ALWAYS PRESENT AND ALWAYS A CONCERN.

AFTER WAITING TWO TO THREE YEARS, WHAT DOES THE FOIA REQUESTER RECEIVE WHEN OPERATIONAL RECORDS ARE INVOLVED? THE PAPER RELEASED IS USUALLY A COMPOSITE OF BLACKED OUT WORDS, INTERSPERSED BETWEEN DISCONNECTED PHRASES WHICH HAVE BEEN APPROVED FOR RELEASE. THUS, AFTER OPERATIONAL RECORDS HAVE BEEN PROPERLY REVIEWED PURSUANT TO THE EXISTING EXEMPTIONS IN THE FOIA, THE PUBLIC DERIVES LITTLE OR NO MEANINGFUL INFORMATION FROM THE FRAGMENTARY ITEMS OR THE OCCASIONAL ISOLATED PARAGRAPH WHICH IS ULTIMATELY RELEASED FROM OPERATIONAL FILES.

THE FACT THAT THE FOIA PROVIDES THE MEANS FOR US TO PROTECT OUR OPERATIONAL INFORMATION IS GENERALLY LOST ON OUR HUMAN SOURCES AND FRIENDLY FOREIGN INTELLIGENCE SERVICES. IN THEIR VIEW, THE VERY PROCESS OF SEARCHING OPERATIONAL FILES AND REVIEWING THE INFORMATION CONTAINED IN THEM POSES A SERIOUS THREAT TO THE ABILITY OF THE UNITED STATES TO PROTECT EITHER THEIR IDENTITY OR THE INFORMATION THEY ENTRUST TO US.

IN OUR VIEW, MR. CHAIRMAN, H.R. 5164 WILL SUBSTANTIALLY ALLEVIATE THE PROBLEMS I HAVE JUST OUTLINED. ONLY OPERATIONAL FILES AS DEFINED BY THIS BILL WOULD BE REMOVED FROM THE FOIA SEARCH AND REVIEW PROCESS. AS I HAVE JUST EXPLAINED, THE OPERATIONAL INFORMATION CONTAINED IN THESE FILES TAKES THE

LONGEST TO REVIEW AND RESULTS IN THE RELEASE OF LITTLE, IF ANY, MEANINGFUL INFORMATION TO THE PUBLIC. THE PUBLIC, THEREFORE, RETAINS ITS ACCESS UNDER THE LAW TO OTHER AGENCY RECORDS. THIS INCLUDES ALL INTELLIGENCE WHICH IS DISSEMINATED TO OUR NATION'S POLICY-MAKERS, AS WELL AS ALL MATTERS OF POLICY FORMULATED AT AGENCY EXECUTIVE LEVELS. IN ADDITION, UNDER H.R. 5164, THE CIA WOULD CONTINUE TO SEARCH ALL ITS FILES, AS IT DOES TODAY, IN RESPONSE TO THREE TYPES OF REQUESTS, THESE BEING REQUESTS BY UNITED STATES CITIZENS OR PERMANENT RESIDENT ALIENS FOR INFORMATION CONCERNING THEMSELVES, REQUESTS FOR INFORMATION CONCERNING A COVERT ACTION THE EXISTENCE OF WHICH IS NO LONGER CLASSIFIED, AND REQUESTS FOR INFORMATION CONCERNING THE SPECIFIC SUBJECT MATTER OF AN INVESTIGATION FOR ANY IMPROPRIETY OR ILLEGALITY IN THE CONDUCT OF AN INTELLIGENCE ACTIVITY.

THERE ARE TWO OTHER IMPORTANT PROVISIONS IN H.R. 5164 WHICH I WOULD LIKE TO TOUCH UPON. FIRST, THERE IS THE REQUIREMENT THAT NO LESS THAN ONCE EVERY 10 YEARS THE DIRECTOR OF CENTRAL INTELLIGENCE SHALL REVIEW ALL THE EXEMPTIONS IN FORCE TO DETERMINE WHETHER ANY CAN BE REMOVED. THIS COULD ALLOW OPERATIONAL FILES TO BECOME ACCESSIBLE TO FOIA SEARCH AND REVIEW WHEN THE SENSITIVITY OF THE INFORMATION THEY CONTAIN HAS DIMINISHED AS A RESULT OF THE PASSAGE OF TIME OR FOR OTHER REASONS. AND SECONDLY, H.R. 5164 SETS FORTH THE RIGHT OF REQUESTERS TO SEEK JUDICIAL REVIEW OF AN AGENCY DECISION TO WITHHOLD INFORMATION BASED ON THE PROVISIONS OF THIS ACT.

AS YOU KNOW, MR. CHAIRMAN, LEGISLATION VERY SIMILAR TO THIS WAS PASSED UNANIMOUSLY BY THE SENATE LAST NOVEMBER. H.R. 5164 COMES TO YOU AFTER HAVING BEEN UNANIMOUSLY REPORTED OUT OF THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE. I BELIEVE THE STRONG BIPARTISAN SUPPORT BEING SHOWN FOR THIS LEGISLATION STEMS FROM THE RECOGNITION THAT THIS IS A CAREFULLY CRAFTED PIECE OF LEGISLATION WHICH WILL BENEFIT THE PUBLIC AS WELL AS THE CIA. THE PUBLIC WILL BENEFIT BECAUSE FOIA REQUESTERS WILL BE ABLE TO RECEIVE RESPONSES TO THEIR REQUESTS ON A MORE TIMELY BASIS WITHOUT THE LOSS OF ANY MEANINGFUL INFORMATION.

THIS CONCLUDES MY TESTIMONY, MR. CHAIRMAN. I HAVE WITH ME THE DEPUTY DIRECTOR OF THE OFFICE OF LEGISLATIVE LIAISON,

CHIEF OF THE
INFORMATION AND PRIVACY DIVISION. WE WILL BE PLEASED TO ANSWER
ANY SPECIFIC QUESTIONS YOU OR THE OTHER MEMBERS MAY HAVE.

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